Supreme Court, U.S.
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No. 92-893

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

HARTFORD LIFE AND ACCIDENT INSURANCE COMPANY and CONSOLIDATED GROUP, INC.,

Petitioners,

v.

RICHARD FUGARINO, JO MARIE FUGARINO, and MARC A. FUGARINO,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY MEMORANDUM

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REPLY MEMORANDUM

1. The respondents' primary argument is that the decision below is consistent with congressional intent because the Employee Retirement Income Security Act of 1974 ("ERISA") was enacted to promote only the interests of "employees and their beneficiaries." Brief for Respondents in Opposition ("Opposition") at 7-9.[1] According to respondents, they "have not found any decision by this Court which determines that ERISA was intended for the protection of employers." *Id.* at 8.

The respondents raise a straw man. The policy implicated by the Sixth Circuit's decision is not whether ERISA protects employers; rather, it is Congress' undeniable intent, in order to protect employees, that employee benefit plans be governed exclusively by one uniform standard—ERISA. *See, e.g., Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 99 (1974). While increased administrative burdens from simultaneous compliance with varying state and federal requirements obviously would disadvantage plan sponsors, Congress enacted ERISA preemption because it also benefits employees. If the dual regulation of ERISA plans sanctioned by the decision below is allowed to undermine ERISA's broad preemptive sweep, then all

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[1] In support of this notion, respondents cite, and reproduce in their appendix, 29 U.S.C. § 1001a. That provision describes congressional intent as it relates to "multiemployer pension plans." *Id.*; Opposition, App. at A1-A2. The ERISA plan in this case, however, is neither a "multiemployer" plan nor a "pension" plan; it is a welfare plan sponsored by a single employer. *See* Petition for Writ of Certiorari ("Petition"), App. at 7a-9a (opinion below).

participants and beneficiaries will suffer because, among other things, the resulting administrative burden and expense will create pressures to increase employee costs, reduce benefits or eliminate benefit plan coverage entirely. *See* Petition at 18-23.

2. The respondents also contend that the decision below does not create a split in the lower courts. Opposition at 10-12. However, respondents' attempt, in two footnotes, to distinguish the two primary decisions cited by the petitioners as conflicting with the holding below are unavailing.

Respondents insist that *Forbau v. Aetna Life Insurance Co.*, No. D-1235 (Tex. Nov. 4, 1992),[2] involved a "corporate shareholder"[3] rather than a sole proprietor, and therefore is distinguishable from, rather than inconsistent with, the opinion below. Opposition at 10 n.5. Respondents, however, have raised a distinction without a difference. The rationale of the court below rests on 29 C.F.R. § 2510.3-3(b), which encompasses any "individual who wholly owns a trade or business (*incorporated or unincorporated*)." *Id.*; *see* Petition, App. at 12a (opinion below) (emphasis added). Thus, for ERISA purposes, Forbau, the sole owner of a corporation, is no different than Fugarino, the sole proprietor of an unincorporated business. Under the Sixth Circuit's decision, both corporate owners

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[2] Since the Petition was filed, *Forbau* has been published at 16 Employee Benefits Cas. (BNA) 1007.

[3] Although the Opposition refers to the plan participant in *Forbau* as a "corporate shareholder," he in fact was the sole owner and operator of a grocery store corporation that purchased ERISA medical coverage. *See* 16 Employee Benefits Cas. (BNA) at 1008.

and sole proprietors are equally ineligible for participant status—a holding fundamentally at odds with the Texas Supreme Court's decision in *Forbau* allowing such parties to assert ERISA claims.[4]

The respondents also suggest that *Harper v. American Chambers Life Insurance Co.*, 898 F.2d 1432 (9th Cir. 1990), does not establish a circuit split because the only issue before the court was whether the plan at issue was an ERISA plan. Opposition at 10 n.4. However, contrary to the respondents' assertion, two issues were presented in *Harper*: first, whether an ERISA plan was established; and second, whether the presence of an ERISA plan triggered preemption of all state law benefit claims. *See Harper*, 898 F.2d at 1433. It is the court's holding on this second issue—that ERISA coverage triggers preemption of all state law benefit claims, including claims asserted by partners (a third type of business owner encompassed by the rationale of the court below)—that creates the split relied upon by the petitioners in this case.[5]

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[4] Inexplicably, in an apparent reference to the Sixth Circuit's interpretation of 29 C.F.R. § 2510.3-3(b), the respondents suggest that the petitioners agree with the court's construction of that regulation. Opposition at 6. The respondents are mistaken. As explained in the first section of the Petition, which the respondents' Opposition does not address, the Sixth Circuit fundamentally misconstrued and misapplied this regulation. Petition at 7-12. The Sixth Circuit also ignored the Department of Labor's correct construction of this regulation, to which this Court should defer under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *See* Petition at 9.

[5] The respondents deal at length with a secondary case cited by the petitioners, *Williams v. Wright*, 927 F.2d 1540 (11th Cir. 1991), arguing that the Eleventh Circuit held that *one* plan was created, but that claims for non-ERISA benefits under this plan

3. The respondents finally take issue with two of the many disruptive consequences of the Sixth Circuit's decision described in the Petition. First, the respondents argue that a rule denying state law remedies to employers once employees are added as plan participants contravenes congressional intent by creating "more confusion to both state insurance agencies and employers." Opposition at 13. Second, the respondents deny that a system of simultaneous state and federal regulation will create confusion and chaos for plan administrators, as suggested by this Court in *Nationwide Mutual Insurance Co. v. Darden*, 112 S. Ct. 1344 (1992), because it is easy to determine whether an individual is an "employer" or an "employee." Opposition at 13-14.

With respect to the first argument, the loss of parallel state law remedies is precisely the result intended by Congress whenever an ERISA plan is created. *See, e.g., Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41 (1987). ERISA preemption would ring hollow, and confusion would be the order of the day, if employers covered under the same ERISA plans as their employees were given state law remedies while their employees were restricted to federal law. The only result consistent with Congress' broad

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could be pursued under state law. Opposition at 11-12. This characterization of *Williams* is inaccurate. In contrast to this case, which involves claims under a single ERISA-covered health insurance policy, *Williams* involved simultaneous claims for "retirement" benefits under an ERISA-covered pension plan, medical benefits under an ERISA-covered welfare plan, and fringe benefits such as country club dues and a company car under non-ERISA plans. *See* 927 F.2d at 1543 & nn. 4-6, 1550.

preemptive intent is for *all* benefit claims under ERISA plans to be governed exclusively by ERISA, regardless of how the plan becomes subject to ERISA or who asserts the claim.[6]

The respondents' final argument concerning *Darden* misapprehends the nature of the confusion created by the decision below. That confusion does not primarily result from difficulty in distinguishing between employers and employees, although that too would surely create confusing litigation in many cases.[7] Rather, the Sixth Circuit's decision creates confusion primarily because it interjects fifty varying state law standards, applicable to all benefit claims asserted by employers, into a benefit structure that heretofore was governed exclusively by ERISA. If plan sponsors and administrators are required to untangle a web of confusing

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[6] Indeed, the employer in this case, like many other small business owners, took affirmative actions to establish an ERISA plan: he submitted a signed enrollment card, identical to the ones submitted by his employees, stating that he was participating in an ERISA plan, and he specifically arranged to add certain of his employees as plan participants. This affirmative election of ERISA coverage, in lieu of an individual insurance policy restricted to Fugarino and his dependents, was advantageous to Fugarino, since, among other things, it allowed him to obtain the significantly lower rates available for group coverage including his employees. The voluntary decision of Fugarino—or any business owner—to obtain the advantages of ERISA coverage triggers all of ERISA's provisions, including ERISA preemption.

[7] As this Court noted in *Darden*, the common law test for identifying employer-employee relationships contains "no shorthand formula or magic phrase that can be applied to find the answer"; rather, it requires assessment of as many as twenty relevant factors, none of which is controlling. 112 S. Ct. at 1348-49.

and contradictory state law regulations in addition to ERISA, the result will be unprecedented confusion and complication—precisely the result that Congress sought to avoid when it enacted ERISA's sweeping preemption provision.

CONCLUSION

For the foregoing reasons, the Petition should be granted and this case set for plenary consideration.

January 27, 1992 Respectfully submitted,

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